tension of the class of jurisdictional facts.[19] It has been expressly held that it is for the court to decide to whom administration shall be entrusted; and that its action in the matter, however irregular, cannot be impeached collaterally.[20]

EXTINGUISHMENT OF POWERS. — The subject of extinguishment of powers has suffered from a tendency to lay down as established this broad general proposition: that while powers appendant and powers in gross or collateral may be extinguished, a power *simply* collateral may not.[1] This classification, which represents the generally accepted idea of the present English law, is commonly supported on the theory that in the first two cases, since the donee has himself an interest, he may extinguish this interest; in the third case, since he has been given no personal interest in the exercise of the power, he may not extinguish it to the detriment of others.

It is interesting to see where this criterion of personal interest in the donee logically leads in the cases of powers in gross. Where the power is general, the donee has plainly an interest in its exercise, for he may appoint to himself. But when the power is special, the donee may clearly not appoint otherwise than among the specified class, and his own personal interest could not be furthered by the exercise of the power. Furthermore, if he attempts to further his own interests by agreeing to exercise the power in a certain way, such agreement, unless the benefit to himself be merely incidental or unsubstantial, is void.[2] It would therefore seem that if the criterion of interest is to be followed, the donee should not be allowed to extinguish a special power in gross. This test of personal interest in the donee supports the third proposition, that a power *simply* collateral may not be extinguished. All the cases, however, appear to be either of special powers of appointment or of powers of management: the crucial case of a general power of appointment vested in a person who is a stranger to the title has not arisen.

This logical application of the test rests on considerable support in the earlier law.[3] It was applied by Preston, who classified special powers as powers of selection rather than as powers of appointment.[4] Sugden, however, took the contrary view. He felt that if such special powers could not be extinguished by a fine the intention of many settlements to allow a provision to be made for all children whether living at the donee's death or not would be defeated.[5] But it is difficult to see why any such intention could not have been adequately expressed in the settlement, and the abolition of fines and recoveries has swept away the very foundation of the argument.

The five English cases allowing the extinguishment of a special power in gross rested largely on the further reasoning that, though the donee could

---

[19] See Salter *v.* Hilgen, 40 Wis. 363; Coltart *v.* Allen, *supra;* Nichols *v.* Smith, 28 N. H. 296.

[20] Simmons *v.* Saul, 138 U. S. 439, 452.

[1] Leake, Digest Law of Property, 386, 387.

[2] Topham *v.* Duke of Portland, 11 H. L. Cas. 32. But *cf. In re* Radcliffe, [1892] 1 Ch. 227; Gilbert *v.* Stanton, 2 Commonwealth L. R. 447.

[3] See Sugden, Powers, 8 ed., 906, 907.

[4] 2 Preston, Abstracts of Conveyancing, 261; 3 *ibid.* 399. See Norris *v.* Thomson's Excrs., 20 N. J Eq. 489.

[5] Sugden, Powers, 8 ed., 907.

not lawfully convey an estate in excess of his own, yet he could so convey tortiously, and should not by exercising his power subsequently be allowed to derogate from his own grant.[6] But at the present day, when all conveyances are innocent, such reasoning has no place, since the exercise of a power in which the grantor has no interest cannot derogate from a conveyance which carries his interest.[7] Neither have the English cases differentiated between powers to appoint by deed and powers to appoint by will: they have allowed both alike to be extinguished. The intention of the donor of the power is a cardinal consideration in the whole law of powers and is always to be carefully weighed.[8] In all powers to appoint by will the donor has *ipso facto* expressed an intention that the donee should be free to exercise the power up to the day of his death. Equity recognizes that intention and refuses to aid the execution by deed of a power to appoint by will.[9] Furthermore a donee of a power to appoint by will has no interest in the exercise of the power, for he cannot appoint to himself. Therefore, in spite of the dissenting opinion[10] in a recent case, the incipient tendency[11] of American courts towards the view that such a power is inextinguishable appears to reach a result which is logically sound and which also effectuates the donor's intention. *McFall* v. *Kirkpatrick*, 86 N. E. 139 (Ill.)

LIBEL OF A CANDIDATE FOR ELECTION TO A PUBLIC OFFICE. — A communication made *bona fide* upon a subject matter, in reference to which the party communicating has a duty, is privileged, if made to a person having a corresponding duty, even though it be only a moral duty of imperfect obligation.[1] Although this proposition of Lord Campbell's has been generally accepted, the courts have reached different results in its application; and the diversity of opinion has been especially great on the question whether the rule should be applied to communications made to the public regarding

---

[6] West *v.* Berney, 1 Russ. & M. 431; Smith *v.* Death, 5 Madd. 371; Horner *v.* Swann, Turn. & R. 430; Bickley *v.* Guest, 1 Russ. & M. 440; Smith *v.* Plummer, 17 L. J. Ch. 145.

[7] Learned *v.* Tallmadge, 26 Barb. (N. Y.) 443. The validity of an appointment which is not in derogation of a grant, *e. g.*, an appointment after bankruptcy of the donee, is unquestioned. Doe *v.* Jones, 10 B. & C. 459; Legett *v.* Doremus, 25 N. J. Eq. 122.

[8] *Cf. inter al.* Sugden, Powers, 58, 60.

[9] Story, Eq. Jurispr., 11 ed., § 97; Reid *v.* Shergold, 10 Ves. Jr. 370, 379.

[10] The majority went off on a very dubious application of the Rule in Shelley's Case which made the power a power appendant, and hence extinguishable. But a dissenting judge considered that the donee had only a life estate; consequently that the power to appoint in fee by will was a power in gross, which was not extinguished by the conveyance in fee, as such conveyance only operated on her life interest and could not be an appointment, which could only be made by will. For a full statement of the facts of this case, see RECENT CASES, p. 456.

[11] Learned *v.* Tallmadge, *supra;* Gaskins *v.* Finks, 90 Va. 384; Bentham *v.* Smith Cheves (S. C.) Eq. 33; Ruggles *v.* Tyson, 104 Wis. 500; *In re* Collard & Duckworth, 16 Ont. 735. See also Dorizac *v.* Public Trustee, 13 New Zealand 538; Williams, Real Property, 18 ed., p. 371. *Contra*, Thorington *v.* Thorington, 82 Ala. 489; Atkinson *v.* Dowling, 33 S. C. 414; Grosvenor *v.* Bowen, 15 R. I. 549. The first two cases follow the English authorities without reasoning. See also Norris *v.* Thomson's Excrs., 19 N. J. Eq. 307, where the class to whom the appointment was to be made joined with the donee in extinguishing.

[1] Harrison *v.* Bush, 5 E. & B. 344.